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**DECISION**



*J. Robert Taylor*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-192428

DATE: August 31, 1978

MATTER OF: Mitchell Brothers General Contractors

**DIGEST:**

1. Where bid form did not explicitly require bids on all items, insertion of "No Bid" in bid spaces for certain additive items did not render bid nonresponsive.
2. Protester's attempt to modify its bid downward after bid opening on the basis that it was the low conforming bidder was properly not considered by agency, because at time of bid opening, protester was not an otherwise successful bidder as contemplated by IFB's clause concerning Late Bids, Modifications of Bids or Withdrawal of Bids.

Mitchell Brothers General Contractors (Mitchell) protests the award of a contract to C. E. Lowther (Lowther) under Invitation for Bids (IFB) N62467-78-B-4242 issued by the Department of the Navy (Navy) for the construction of a swimming pool at Laurel Bay, Marine Corps Air Station, Beaufort, South Carolina.

The IFB solicited a base bid, Item No. 1, for basic construction, and three additive bid items for additional desired features of construction.

On June 13, 1978, the four bids received were opened with the following results for the two low bidders:

	<u>Item No. 1</u>	<u>Item No. 2</u>	<u>Item No. 3</u>	<u>Item No. 4</u>
Lowther	\$452,500	44,000	No Bid	No Bid
Mitchell	\$456,789	54,321	45,678	14,321

In accordance with the Defense Acquisition Regulation § 2-201(b)(xli) Navy's Contracting Officer, prior to the opening of the bids, had determined and recorded in the contract file the amount of funds available for the procurement. At the time of bid opening Navy disclosed this control amount to be \$469,000.

Pursuant to the IFB instruction to bidders No. 21 entitled "Additive or Deductive Items", all bids were evaluated in relation to the announced control amount. For evaluation purposes, it was determined that award could be made only for the base bid, Item No. 1, because addition to the base bid of any one of the additive Item Nos. 2, 3 or 4 of any of the bidders would have brought the total bid amount above the control amount. Lowther, having submitted the low bid for Item No. 1, was, therefore, declared the winner.

Mitchell contends that Lowther's "No Bid" responses for Additive Item Nos. 3 and 4 made its bid nonresponsive to the terms of the IFB. In making this assertion, Mitchell refers to IFB Instruction to Bidders clause 5(b) entitled "Preparation of Bids" and contends that this clause "requires the bidder to bid on all items." Mitchell further argues "that since the Architect and Engineer designed 4 items and the Government estimate shows 4 items and the bidding documents contained 4 items, that [the requirement to bid on all items] is explicit and C. E. Lowther's failure to bid on all 4 items constitutes a nonresponsive bid."

On the strength of an alleged post-bid opening modification to its bid, Mitchell further contends that it was in fact the "low conforming bidder." On June 15, 1978, two days subsequent to bid opening, Mitchell sent a letter advising the Navy's contracting officials that "as the apparent low conforming bidder, we do herewith modify our Bid Item #4 by reducing it to the sum of \$12,121." Mitchell maintains that its post-bid opening modification was properly made pursuant to IFB clause No. 7 entitled "Late Bids, Modifications of Bids or Withdrawal of Bids", and concludes in stating that "our aggregate

total of Bid Items 1 and 4 was within the control amount and since C. E. Lowther did not bid Items 3 and 4 he could not be considered."

After reviewing the record, we find Mitchell's bases for protest to be lacking in merit.

In the first instance, the IFB clause 5(b), upon which Mitchell relies when it contends that bidders were required to bid on all items, reads in pertinent part as follows:

"Where the bid form explicitly requires that the bidder bid on all items, failure to do so will disqualify the bid. When submission of a price on all items is not required, bidders should insert the words 'no bid' in the space provided for any item on which no price is submitted." (Emphasis added.)

In the instant solicitation, the bid forms did not elsewhere explicitly require bidding on all items, and, contrary to Mitchell's assertion, the mere fact that 4 items appear on the solicitation's bid schedule does not require a bid on all items. By inserting "No Bid" for Item Nos. 3 and 4, Lowther properly prepared its bid in accordance with the guidance of the last sentence of the above-quoted IFB clause 5(b), and as such, is responsive to its terms.

Whenever a bidder does not bid on certain additive or deductive items, the bidder runs the risk that its bid will be eliminated from consideration, but only if the evaluation process dictates acceptance of the items not bid. See 51 Comp. Gen. 792 (1972) and 42 Comp. Gen. 61 (1962). If the facts in the instant case were such that Mitchell or one of the other bidders provided a bid total of Item No. 1 and either Item No. 3 or No. 4 which did not exceed the control amount, then Lowther would have been eliminated from consideration.

With regard to the protester's contention that it was the "low conforming bidder," we note that Mitchell's post-bid opening letter attempted a downward modification of its bid Item No. 4 based upon the following exception stated in IFB clause 7(d):

"\* \* \* a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted." (Emphasis added.)

Although it is legally permissible to reduce a low responsive bid after opening (Condec Corp. v. U.S., 369 F.2d 753 (Ct. Cl, 1966); Leitman v. U.S., 60 F. Supp. 219 (Ct. Cl, 1945); Park Construction Company, B-190191, July 18, 1978, 78-2 CPD 42; P&N Construction Company, Inc., 56 Comp. Gen. 328, 77-1 CPD 88), the Mitchell bid, at the time of bid opening, was not the low responsive or otherwise successful bid. The solicitation's instruction No. 21 to bidders provided that the low bidder for purposes of award would be the responsive, responsible bidder offering the low aggregate amount for the first or base bid item plus any additive bid item providing the most features of the work within the available funds, as determined prior to bid opening. Even if Mitchell had submitted the lowest total price for item 1 plus item 4, that sum exceeded the announced control amount available and therefore under instruction No. 21 Mitchell was not a successful low bidder as of the time of bid opening. Consequently, a late price reduction could not be considered under the exception quoted above in instruction 7(d).

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

*J. Roberts*  
*11/2*

B-192428

August 31, 1978

The Honorable Strom Thurmond  
United States Senate

Dear Senator Thurmond:

We refer to your letter to our Office dated July 28, 1978 concerning the bid protest of Mitchell Brothers General Contractors under solicitation No. N62467-78-B-4242 issued by the Department of the Navy.

By decision of today, copy enclosed, we have denied the protest. As you requested we are also returning your correspondence.

Sincerely yours,

*R. F. Kitten*  
Deputy Comptroller General  
of the United States

Enclosures - 2